IN THE

Supreme Court of the United States

October Term, 1958.

No. [redacted] 11

EDGAR ALLEN WEST,

Petitioner,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, et al.

Respondent,

and

ATLANTIC PORT CONTRACTORS, INC.,

Respondent Impleaded.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IMPLEADED

[redacted]

Counsel for Respondent Impleaded

[redacted]

Of Counsel.

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No. 541.

EDGAR ALLEN WEST,

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UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

Respondent,

v.

ATLANTIC PORT CONTRACTORS, INC.,

Respondent-Impleaded.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT-IMPLEADED.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 143 F. Supp. 473 (E. D. Pa., 1956) (R. 8). The opinions of the Court of Appeals for the Third Circuit are reported at 246 F. 2d 443 (R. 129) and 256 F. 2d 671 (R. 135).

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. Does the warranty of seaworthiness extend to a shoreside worker engaged in reconditioning a ship which is not in navigation?

2. Did libellant prove negligence on the part of the respondent?

COUNTERSTATEMENT OF THE CASE.

Petitioner, a shoreside marine engineer employed by Respondent-impleaded, Atlantic Port Contractors, Inc., instituted this suit in the District Court for the Eastern District of Pennsylvania by a libel in personam against the respondent, United States, as owner of the Liberty Ship, S. S. MARY AUSTIN.

The libel claimed damages for injuries suffered aboard the "MARY AUSTIN" on grounds that the vessel was unseaworthy and that respondent had failed to provide libellant with a safe place to work.

The trial court ruled that the evidence failed to establish either unseaworthiness or negligence on the part of respondent and dismissed the libel and the action over for indemnity.

Petitioner persists in referring to the personnel aboard the ship as a "crew", whereas, in fact, the trial court specifically found that they were not a crew in the ordinarily accepted context; they merely performed routine inspection of the reactivation work. (See Finding of Fact No. 7, R. 10, 11.)

The "MARY AUSTIN" had been placed in the so-called "Moth Ball Fleet" following World War II. In connection with the Korean conflict, it was decided to reactivate her and place her in active service.

Respondent-impleaded, Atlantic Port Contractors, Inc., was awarded the contract for the complete reactivation and

overhaul of the ship. On November 5, 1951, the "MARY AUSTIN", a dead, completely deactivated vessel, was delivered at Pier 5, on the Delaware River, Philadelphia, Pennsylvania to Atlantic Port Contractors, Inc. for reactivation.

During the course of this work, on November 21, 1951, petitioner was working on the rings inside the low pressure cylinder of the ship's main engine when he was struck on the left knee by a pipe plug which came from an overhead water pipe when a fellow employee turned on the water without warning. Suit was brought for the injury thus received.

The trial court found that the "MARY AUSTIN" was not a vessel in navigation at the time of the injury; and that the work being done by West was not of the type ordinarily performed by seamen, therefore, libellant was not within the class of persons to whom the warranty of complete seaworthiness runs. The trial court further held that, as to negligence, the duty to provide a safe place to work although non-delegable was not absolute but rather a requirement of reasonable care under the circumstances. The injury to the petitioner resulted from an act of a fellow employee for whom respondent was not responsible and therefore respondent was not guilty of negligence.

The Court of Appeals affirmed both of the above rulings of the District Court.

ARGUMENT.

Scope of Review.

In reviewing a judgment of a trial Court, sitting without a jury in admiralty, an appellate Court exercises no greater scope of review than it exercises under Rule 52(a) of the Federal Rules of Civil Procedure. A reviewing court may not set aside the judgment below unless it is clearly erroneous. *McAllister v. United States*, 348 U. S. 19, 20; *Cromady v. The J. H. Fisser*, 358 U. S. 423, 428; *Lyon v. United States et al.*, 265 F. 2d 219, 220 (2 Cir., 1959); *Clinton v. Joshua Hendy Corp. et al.*, 264 F. 2d 329, 333 (9 Cir., 1959).

I.

The Warranty of Seaworthiness Does Not Extend to a Shoreside Worker Engaged in Reconditioning a Ship Which Is Not in Navigation.

The question of what constitutes a "vessel" should not be confused with the entirely separate and distinct concept of a "vessel in navigation".

The existence of a vessel as an entity begins when she is launched and continues so long as her identity is preserved. *Tucker v. Alexandroff*, 183 U. S. 424, 438 (1902). However, even when launched, a "vessel" does not become a "vessel in navigation" until she in fact is engaged in navigation and marine commerce. *Frankel v. Bethlehem-Fairfield Shipyard, Inc.*, 132 F. 2d 634 (4th Cir., 1942), certiorari denied, 319 U. S. 746 (1943). When a vessel is withdrawn from navigation and commerce, although she retains her identity as a "vessel" for jurisdictional purposes, she has lost her character or status as a "vessel in navigation". *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187 (1952); *Antus v. Interocean S. S. Co.*, 108 F. 2d 185 (6th Cir., 1939).

The concept of a "vessel in navigation" is not determined by whether or not she is afloat but rather from a consideration of all factors and circumstances surrounding the period in question: The trial judge found, 143 F. Supp. 473, 479:

> "The fact that the S. S. MARY MARTIN was afloat is not controlling; although, it should be noted that she most certainly was in her then condition not a navigable vessel. . . ."

The trial court then quoted from the *Despar* case, *supra*, to the effect that there was no vessel engaged in navigation.

It is plain that at the time of the injury to petitioner the "MARY AUSTIN" was not physically able to operate in the functional manner for which she was designed. She had no crew. There was no showing that she possessed a Coast Guard certificate authorizing her to be in service or that she conformed to American Bureau of Shipping Standards.

The trial judge concluded that the "MARY AUSTIN" was not a vessel in navigation and it is submitted that he was eminently justified in so concluding.

The cases cited in petitioner's brief at pages 5 and 6 are all concerned with the status of the craft involved, e.g., whether a houseboat (*Kilb v. Menke*); a barge with a pile driver mounted on it (*The V1481*3); a submerged and wrecked steamship which had been raised and towed to a pier for repairs (*North Pacific S. S. Co. v. Hall*) or a sealing vessel (*Hercules Co. v. The Brigadier General Absolom Baird*) as "vessels" so as to be within the jurisdiction of admiralty courts for the purpose of being subject to maritime liens. This constitutes a wholly separate and distinct question than the status of a "vessel in navigation", so as to bring into play the substantive law relating to the warranty of seaworthiness.

At pages 7, 8 and 9 of Petitioner's Brief references are made to "the officers of the vessel", "a crew of officers" and "captain and crew". The trial court specifically found:

> ". . . these men were the officers, as designated, who sailed with the vessel on her first voyage after her reactivation. At the time of the accident, however, and at all times during the repairs, they had not signed Articles; they were merely on the United States Lines Co. weekly payroll. These six men performed some of the duties of a regular crew, but they did not have control of the repair work, the manner in which it was performed, or the rate at which it progressed, and they did not have control of the ship in the ordinarily accepted context. Their chief function was to assist Mr. Cameron in inspecting the various items of work as completed and to help him discharge his duties efficiently. . . ." (Finding of Fact No. 7, R. 10, 11.)

Petitioner has never in any of the prior proceedings assigned this as error or attacked this finding of the trial court as clearly erroneous; he simply ignores the finding and asserts its converse.

The inapplicability of the warranty of seaworthiness to a shoreside worker engaged in reconditioning a ship which has been removed from navigation so that it may re-enter navigation is considered in *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187 (1952). In that case the petitioner had been employed in the previous year by the owner of a fleet of sightseeing motor boats as a boat operator. Prior to the opening of the season in 1948 he was employed in reconditioning the boats which had been laid up, taken out of navigation, for the winter months. He was at work cleaning, painting and waterproofing the boats, and expected to be employed as a boat operator when the boats

were recommissioned. This court held that he was not a seaman because there was no vessel engaged in navigation.

Petitioner seeks to distinguish the present case from *Desper* on the grounds that the boats in *Desper* were not afloat and that the issue there was whether the decedent was a "seaman" within the purview of the Jones Act. The facts which bring one within the definition of a "seaman" under the Jones Act are the same as those necessary to make the warranty of seaworthiness run to petitioner. There must be a vessel in navigation and the work being performed must be of the type which, historically, was usually performed by members of a ship's crew. Cf. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946).

The suggestion that the *Desper* decision was reached solely on the basis that the boats there involved were not afloat is without foundation. The important ultimate facts found there as in this case were (1) that the boats had been removed from navigation and (2) the boats had not at the time of the accident been recommissioned and recommitted to navigation.

This Court clearly indicated in the *Desper* case that these were the criteria applicable and not whether the boat was on shore or afloat by citing with approval *Hauch v. American S. S. Co.*, 107 F. 2d 999 (2nd Cir. 1939), and *Atlas v. Interocean S. S. Co.*, 108 F. 2d 185 (6th Cir. 1939).

The *Hauch* case, *supra*, was a suit for maintenance and cure for injuries suffered aboard a ship in the harbor at Buffalo, N. Y. The vessel, after being anchored and empty in the harbor for a year, had been moved to a wharf to be used for grain storage. The plaintiff had been hired to handle lines necessary to move the ship back and forth along the wharf so that grain chutes could reach the hatches. He was injured performing these duties. The Court held that the ship had been withdrawn from navigation and that therefore the services being performed were not of a nature ordinarily performed by seamen.

Antus v. Interocean S. S. Co., supra, affirmed dismissal of an action under the Jones Act. *Antus* was a member of the crew of the "JAMES E. DAVIDSON" during the summer months of 1936 and until December of that year. In December all members of the crew were dismissed. *Antus* and certain other former members of the engineering department were re-hired to lay up the vessel for the winter. Antus was hired to overhaul the engines, remove bolts from cylinder-heads and chests, clean bilges and perform other similar operations. The Court said at p. 187:

> ". . . The vessel, while not consigned to a ship's graveyard, was tied up to the piles. Instead of doing this work in preparation for navigation, the men were preparing the vessel for winter quarters. Appellant was not subjected to any maritime hazards. The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature. The finding of the District Court upon this point was correct, and appellant was not at the time of his injury a seaman. Therefore he was not entitled to sue under section 688 of Title 46, U. S. C., 46 U. S. C. A. Sec. 688."

In holding, in the *Hawn* case, that handling lines to warp the ship along a dock were not services ordinarily performed by seamen and, in the *Antus* case, that cleaning bilges was work not maritime in nature, the Courts did not mean that these services are services outside of a seaman's usual employment. It is submitted what they did mean was that upon consideration of all the surrounding circumstances, i.e., (1) the nature of the overall work being done on the ship, (2) the status of the persons performing the work and (3) the status of the ship at the time the work was being done; that the job being performed was not maritime in nature, and was not of the type historically or usually performed by seamen.

Upon consideration of these factors, the work being performed in the "MARY AUSTIN" was not work ordinarily or historically performed by seamen. (1) The overall job being performed on the "MARY AUSTIN" was the rebuilding and reactivation of a dead ship which had been withdrawn from navigation. (2) The "MARY AUSTIN" was a dead ship not in navigation. (3) The plaintiff and other men performing the work were shoreside employees of a ship repair company. The work of reactivating ships which have been stripped and withdrawn from navigation is work which historically has always been and is now ordinarily carried out by shipyards and shoreside workers, not by seamen. (See Conclusion of Law No. 3 of trial court, R. 20.)

Petitioner's Brief, pages 11-14, inclusive, contains an historical review of cases which preceded *Seas Shipping Co. v. Sieracki*, *supra*, and *Pope and Talbot v. Hawn*, 346 U. S. 406. All of these cases involved stevedores or longshoremen engaged in loading or unloading work, traditionally held to be seamen's services. Yet, even this premise has been questioned. See, Tetreault, Seamen, Seaworthiness and the Rights of Harbor Workers, 39 Cornell L. Q. 381, 413, 414 (1954).

At page 16 of his brief, petitioner states that since he was engaged in an effort designed to prepare the vessel for sea he is entitled to the warranty of seaworthiness. No cases are cited in support of this statement.

As was said by the trial judge in the instant case:

> "This case presents about as close an approximation to home port structural repairs as analogy will allow. The work here being done was not of the type ordinarily performed by seamen and does not fall within the doctrine of the Sieracki and Hawn cases." (*West v. United States*, 143 F. Supp. 473, 479.)

The most recent decision in point is *United Pilots Ass'n. v. Halecki*, 358 U. S. 613. There the decedent was

the employee of a sub-contractor of a ship repair yard and died as the result of inhaling carbon tetrachloride fumes in cleaning the electrical generators of a pilot boat as part of its annual overhaul.

This court stated (p. 617):

> "Sea Shipping Co. v. Sieracki and Pope & Talbot v. Hawn made clear that the shipowner could not escape liability for unseaworthiness by delegating to others work traditionally done by members of the crew. Whether their calling be labeled 'stevedore', 'carpenter', or something else, those who did the 'type of work' traditionally done by seamen, and were thus related to the ship in the same way as seamen 'who had been or who were about to go on a voyage', were entitled to a seaworthy ship. See 346 U. S., at 413.
>
> "Neither these decisions nor the policy that underlies them can justify extension of liability for unseaworthiness to the decedent in the present case. The work that he did was in no way 'the type of work' traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was "dead" with its generators dismantled.' "

Other recent cases of a similar nature reach the same conclusion.

In *Reida v. United States*, 252 F. 2d 117 (4 Cir., 1958) affirming 153 F. Supp. 777, certiorari denied, 356 U. S. 973, the Fourth Circuit adopted as its own the opinion of District Judge Chesnut, who had cited with approval and followed the decision of the trial judge in the case at bar.

The facts there were that libellant was a shipyard fitter for the respondent impleaded, Bethlehem Steel Company. The United States had awarded Bethlehem the contract for major structural repairs to a seagoing dredge. During the course of the work, while libellant was estab-

lishing a center chalk line for the installation of new hoppers on the dredge, he backed into a hole left by the removal of a metal plate by his fellow workers, fell 25-30 feet and was seriously injured. The principal question was whether the shipowner's duty to provide a seaworthy ship extends to a shipyard worker engaged in making major repairs aboard a vessel in drydock. Judge Chesnut held that the conversion and repairs, particularly libelant's work, were not the type of services historically and traditionally rendered to the ship by the members of the crew; that on the contrary such services require the facilities and skilled personnel of a modern well-equipped shipyard, and that neither reason nor authority required extension of the *Sieracki* doctrine to a case such as this.

The *Haleski* case, *supra*, was decided by the Second Circuit on the same day as *Ivan Berge v. National Bulk Carriers, Inc.*, 251 F. 2d 717 (2nd Cir., 1958) affirming 148 F. Supp. 608, certiorari denied, 356 U. S. 958. In *Berge*, the libellant, a shoreside repair worker, was injured aboard a vessel undergoing major interior repairs and alterations, alongside a pier (148 F. Supp. 608), as was the "Mary Antoinette". The trial court (Judge Murphy) in denying a recovery on the ground of unseaworthiness followed the decision of the lower court in the case at bar.

In *Owens v. United States*, 1958 A. M. C. 216 (S. D. Fla. 1957) the vessel involved was a deactivated one, part of the so-called "Moth Ball Fleet". It was being reactivated for the Korean conflict under a contract similar to the one in the instant case. However, Owens was not an employee of the ship repair contractor but rather had been engaged to serve as assistant second engineer upon reactivation of the vessel. At the time of his injury he was performing inspection work in connection with the reactivation repairs. The Court held that he was not within the scope of the doctrine of seaworthiness because the work he was performing at the time of his accident and injuries

was not seamen's work; and this, even though he was later to ship out as second assistant engineer upon completion of reactivation. Cf. *Desper v. Starved Rock Ferry Co., supra.* The Court also held that a deactivated vessel in the custody and control of a ship repair contractor while undergoing reactivation is not a vessel in navigation subject to the warranty of seaworthiness. See also, *Berryhill v. Pacific Far East Lines*, 238 F. 2d 385 (9 Cir., 1956) affirming 138 F. Supp. 859, certiorari denied, 354 U. S. 938.

United States v. Lindgren, 28 F. 2d 725 (1928), affirmed 281 U. S. 38, discussed at pages 16-17 of Petitioner's Brief, was a suit to recover damages for the death of the third mate of the "Hybert". The principal question presented was whether his administrator could recover under the Virginia death statute or whether the sole remedy was under the Merchant Marine Act of 1920. The Court held that the 1920 Act was exclusive and that, since no dependents survived decedent (a prerequisite to suit under the 1920 Act) no recovery could be allowed. Decedent's administrator also argued the 1920 Act had no application on the grounds that decedent was not a seaman. The Court held that decedent's status as third mate and a seaman had been admitted in the pleadings and was conclusively determined thereby. The Court, as dicta, then stated that even ignoring the pleadings, the decedent, on the facts was a seaman. The facts recited do not set forth the extent of the repairs being carried out, the nature of decedent's services to the ship or to what extent reactivation had been completed.

Read v. United States, (3 Cir., 1953) 201 F. 2d 758, discussed in Petitioner's Brief at pages 19-20 is clearly distinguishable from the instant case. There a "live" vessel in navigation and with officers and crew aboard was delivered to a ship repair company for alterations to change its cargo capacity from freight to troop capacity. The contract called for the work to be done between May 23, 1944

and May 28, 1944 (five days). The vessel came from the sea seeking specialists services and returned to the sea six days later. Historically the work of readying a navigable ship for her next cargo is seamen's work. Though it does not specifically appear in the opinion, the record in the *Read* case establishes that the slip was a live one with officers and crew aboard at the time the alterations were being carried out.

The Courts below were clearly not in error in holding that the service performed by petitioner was not of the type or kind traditionally performed by seamen; that the "Mary Austin" was not unseaworthy, and there was no breach of the warranty of seaworthiness by the respondent.

II.

Petitioner Failed to Prove Negligence on the Part of Respondent.

The libel filed herein predicated liability upon the distinct and separate grounds of unseaworthiness and negligence.

We have previously demonstrated that under the applicable facts and appropriate law there was no vessel in navigation and the nature of the services performed by petitioner in relation to the vessel were not such as had been traditionally and historically performed by seamen. Petitioner, therefore, failed to make out a cause of action based upon unseaworthiness and dismissal of the libel on this ground was proper.

The trial court found that respondent, United States, was not guilty of negligence.

The evidence clearly supports the court's findings that the United States turned over to the reactivation repair contractor, Atlantic, a vessel that was a deactivated, drained, inert "dead" ship for complete overhaul. There was nothing in the condition of the "Mary Austin" at that time which could have caused petitioner's injury. It

was not until sometime later when a fellow employee of the petitioner turned on the water that altered conditions so as to cause the injury to petitioner.

The courts below held that respondent, United States, was under a duty to provide petitioner with a safe place to work and that this duty was a nondelegable one.

The trial judge held:

> "The question presented is the nature and extent of that duty. Unlike the distinct and sometime overlapping duty to provide a seaworthy vessel and appurtenances, a shipowner's duty to provide a safe place to work is not an absolute duty; rather, it is a requirement of reasonable care under the circumstances. Brabazon v. Belships Co., 3 Cir., 1953, 202 F. 2d 904, 906. It is not a unique and separate ground of liability but rather liability predicated upon negligence. Cookingham v. United States, 3 Cir., 1950, 184 F. 2d 213, see opinion of Chief Judge Kirkpatrick, D. C., E. Pa. 1949, 87 F. Supp. 203, 205". (143 F. Supp. 473, 480)

In affirming the action of the trial judge on this phase of the case, Judge Goodrich speaking for the 3rd Circuit held:

> "But the legal responsibility for the place in which a workman carries on activities is not an insurer's liability for safety but responsibility only for the exercise of reasonable care with regard to the premises at which work is done. It is a nondelegable duty but not an absolute one. It is rather a nondelegable obligation that reasonable care shall be used. This was pointed out with clarity by this Court in Barbazon v. Belships Co., 202 F. 2d 904 (3d Cir., 1953), and reiterated by us in Osnovitz v. United States, 204 F. 2d 654 (3d Cir., 1953).
>
> "So far as these premises were concerned there was no lack of safety. Even if the plug was loose that

did no harm to West or anyone else. The accident to West came because a fellow employee of the contractor did a positive and negligent act. For such superadded, affirmative conduct, the owner of the premises is not responsible. See 2 Restatement, Torts § 426 (1934)." (256 F. 2d 671, 672)

The Third Circuit in the *Brabazon* case, *supra*, relied upon the decision of this Court in *Baltimore & Ohio S. W. R. Co. v. Carroll*, 280 U. S. 491 (1930) wherein it was held:

> "The employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end. Seaboard Air Line v. Horton, 233 U. S. 492, 502; Yazoo & M. V. R. R. Co. v. Mullins, 249 U. S. 531, 533." (280 U. S. 491, 496)

Petitioner urges at pages 21-24 of his brief that the Courts below erred in qualifying the shipowner's duty to provide a safe place to work to one of reasonable care and in relating it to negligence rather than unseaworthiness.

It is submitted that failure to provide a safe place to work may be an element in the establishment of either unseaworthiness or negligence but that in and of itself it is not a distinct and separate ground of liability. See, *Cookingham v. United States*, 87 F. Supp. 203, 205.

Failure of the petitioner to make out a cause of action based upon unseaworthiness has been covered earlier in this brief.

Mahnich v. Southern Steamship Co., 321 U. S. 96 and *The Scandinavia*, 102 F. 2d 577 (6 Cir., 1939) cited and relied on by petitioner at page 22 of his brief are both cases of pure unseaworthiness.

Cromady v. The J. H. Fisser, 358 U. S. 423, cited and relied on at pages 23, 24 and 25 of petitioner's brief is clearly distinguishable from the case at bar. The unseaworthy condition of the vessel, i.e., the safety cut off device

on the winch being set to operate at a load slightly more than twice the safe-working load of the unloading gear; had been caused by employees of the ship before the winch was turned over to the petitioner's fellow employees for operation. 358 U. S. 423, 425, 426. The shipowner was held liable when the stevedores in unloading cargo brought the unseaworthy condition into play.

No such unseaworthy condition existed in the instant case.

Accordingly, the finding of the court below that respondent, United States, did not breach its duty to petitioner to provide him with a reasonably safe place to work is proper and should be affirmed.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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